

Honorable Richard A. Jones
Honorable J. Richard Creatura

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IAN SIMMERS,

Plaintiff,

v.

KING COUNTY, *et al.*,

Defendants.

No. 2:21-cv-00100-RAJ-JRC

OPPOSITION TO PLAINTIFF'S MOTION
TO SUBSTITUTE ESTATES

Noted on Motion Calendar:
April 2, 2021

The families of Major Beard and Sergeant Rusk, joined by Major McSwain and retired Captains Baxter and Raftis, ask the Court to deny Mr. Simmers' motion to substitute the estates of the deceased Deputies as parties to this action.¹ Mr. Simmers has requested relief the Court can't grant and, under applicable law, any claims against the estates abated years ago.

FACTS

Plaintiff Ian Simmers alleges that his rights were violated during a murder

¹ The undersigned attorneys represent the adult children of Major Beard and Sergeant Rusk in this matter. Counsel's other clients, Major McSwain and retired Captains Baxter and Raftis, join the Beard and Rusk families' opposition to Plaintiff's motion.

1 investigation 26 years ago. He has sued the City of Bothell, King County, and current
 2 and former members of the Bothell Police Department and the King County Sheriff's
 3 Office.

4 One of the Sheriff's Deputies named in the Complaint is Major Jackson Beard.
 5 But Major Beard died five years ago, on March 24, 2016. (Decl. of Jackson Beard ¶ 2.)
 6 Major Beard's wife was the sole heir of his estate, and she also has now died. (*Id.*)

7 Another Deputy named in the Complaint is Detective Sergeant Clement Rusk,
 8 who died 14 years ago, on February 5, 2007. (Decl. of Sally Rusk ¶ 2.) Sergeant Rusk's
 9 wife was the sole heir of his estate, and now she, too, has died. (*Id.*)

10 Mr. Simmers has moved for leave to substitute the estates of Major Beard and
 11 Sergeant Rusk as defendants. As discussed below, however, the request is improper,
 12 and it's far too late to bring claims against the estates.

13 **ARGUMENT**

14 Plaintiff's motion to substitute the estates of deceased Deputies must be denied
 15 because there are no parties to substitute in or out, and the Court lacks jurisdiction to
 16 appoint personal representatives. Under Washington's nonclaim statute, moreover, any
 17 state or federal claims against either estate abated two years after each Deputy died.

18 **Plaintiff seeks relief the Court cannot grant.**

19 As a preliminary matter, the Court cannot grant the relief Mr. Simmers seeks. He
 20 has asked for an order substituting the estates of the deceased Deputies as parties.
 21 (Dkt. 25 at 1.) But there are two initial problems with his request.

22 The first problem with Mr. Simmers' requested relief is that there are no parties to
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1 replace with substitutes. As the Ninth Circuit has explained, a plaintiff cannot bring suit
2 against a dead person “or in any other way make a dead person (in that person’s own
3 right, and not through a properly-represented estate or successor) party to a federal
4 lawsuit.” *LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 955 (9th Cir.
5 2020). So Mr. Simmers has not successfully commenced suit against either Major
6 Beard or Sergeant Rusk, and there are no parties to substitute out.

7 The second problem with Mr. Simmers’ request is that there are no entities that
8 can be added as substitutes. An estate is not a legal entity that can be sued. *LN Mgmt.,*
9 *LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 956 (9th Cir. 2020). Instead, an
10 estate acts only through its personal representative, and any legal action must be
11 brought against the personal representative rather than the estate. *Id.* There currently
12 are no personal representatives of Major Beard’s and Sergeant Rusk’s estates, so
13 personal representatives would need to be appointed before they could be added as
14 parties.

15 Perhaps in recognition of this second problem, Mr. Simmers has also asked for
16 “entry of an order authorizing the appointment of personal representatives for the
17 estates of deceased Defendants.” (Dkt. 25 at 1.) Under the probate exception to federal
18 jurisdiction, however, District Courts do not authorize or appoint an estate’s personal
19 representative. *See Marshall v. Marshall*, 547 U.S. 293, 311 (2006). That authority is
20 reserved to state courts. *Id.* (“the probate exception reserves to state probate courts the
21 probate or annulment of a will and the administration of a decedent’s estate”).
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Any state-law claims are barred by Washington's nonclaim statute.

Even if Mr. Simmers brought a motion for appointment of personal representatives in state court, it would be denied because any claims against the deceased Deputies' estates are time-barred.

After a person dies, limitations on actions against his or her estate are governed by the nonclaim statute in the probate code. See RCW 4.16.200 ("Limitations on actions against a person who dies before the expiration of the time otherwise limited for commencement thereof are as set forth in chapter 11.40 RCW."). The nonclaim statute provides that, even if a creditor was not provided notice to submit claims against an estate, "the creditor must present the claim within twenty-four months after the decedent's date of death." RCW 11.40.051(1)(c). This 24-month limit is a "self-executing bar" that is not subject to tolling. RCW 11.40.150. And failure to present the claim within this time limit results in the creditor being "forever barred from making a claim or commencing an action against the decedent." RCW 11.40.051(1).

The purpose of Washington's probate code is "the prompt and efficient resolution of estate claims." *In re Estate of Stover*, 315 P.3d 579, 584, 178 Wn. App. 550, 560–61 (Wash. Ct. App. 2013). Therefore, the nonclaim statute is "more strictly enforced than general statutes of limitations" because of the important interest in final settlement of estates, so "those entitled may receive the property free from incumbrances and charges which might lead to long litigation." *Davis v. Shepard*, 237 P. 21, 24, 135 Wash. 124, 131 (Wash. 1925). No exception is permitted, even for outright fraud, or else estates could never be finally closed and distributed. *Id.* at 24.

1 Mr. Simmers' claims epitomize the type of stale claims the nonclaim statute bars
2 in favor of finality. Not only has the Deputies' property already been distributed to heirs,
3 both Deputies' heirs have since died and had their own property distributed.

4 Since Mr. Simmers did not assert his state-law claims within two years from the
5 date Sergeant Rusk died in 2007 or the date Major Beard died in 2016, the claims are
6 forever barred.

7 **Washington's nonclaim statute also bars any federal claims.**

8 As a general rule, capacity to be sued is determined by state law. See FRCP
9 17(b)(3) ("for all other parties, by the law of the state where the court is located"). And in
10 civil-rights cases specifically, courts look to state law to fill gaps in federal law. This is
11 because 42 U.S.C. § 1988 says that where federal law is "deficient in the provisions
12 necessary to furnish suitable remedies," state law will apply, if it's "not inconsistent" with
13 federal law. Section 1988 recognizes there are certain areas where federal law is
14 insufficient, because it does not cover every issue that may arise in civil-rights actions.
15 *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978).

16 As the Supreme Court has explained, "one specific area not covered by federal
17 law is that relating to the survival of civil rights actions under § 1983 upon the death of
18 either the plaintiff or defendant." *Id.* at 589 (internal quotation marks omitted).

19 *Robertson* was a civil-rights action in federal court against a district attorney and
20 others for allegedly pursuing a criminal prosecution in bad faith. *Id.* at 586. While the
21 civil-rights action was pending, the plaintiff died. *Id.* Under Louisiana law, any civil action
22 abated upon the death of the plaintiff unless he or she was survived by a close relative,
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1 such as a spouse or child. *Id.* at 587. And the plaintiff in *Robertson* had no such relative.
2 *Id.* Believing that abatement of a civil-rights claim was inconsistent with federal law, the
3 District Court declined to apply Louisiana law and, instead, ruled that the claim survived
4 in favor of the personal representative of the deceased plaintiff. *Id.* On appeal, the Fifth
5 Circuit affirmed. *Id.*

6 But the Supreme Court granted review and reversed. *Id.* at 588. The Supreme
7 Court began its analysis by acknowledging that one way state law could be inconsistent
8 with federal law is if the state law is contrary to federal policy underlying the cause of
9 action. *Id.* at 590. And the policies underlying civil-rights actions include compensation
10 of persons deprived of their rights and deterrence of misconduct by state officials. *Id.* at
11 591.

12 Nevertheless, the Supreme Court found nothing in § 1983 “or its underlying
13 policies to indicate that a state law causing abatement of a particular action should
14 invariably be ignored in favor of a rule of absolute survivorship.” *Id.* at 590. The
15 importance of a federal remedy “does not mean that a § 1983 plaintiff (or his
16 representative) must be allowed to continue an action in disregard of the state law to
17 which § 1988 refers us.” *Robertson*, 436 U.S. at 593.

18 On the contrary, a state statute is not inconsistent with federal law “merely
19 because the statute causes the plaintiff to lose the litigation.” *Id.* “If success of the
20 § 1983 action were the only benchmark, there would be no reason at all to look to state
21 law, for the appropriate rule would then always be the one favoring the plaintiff, and its
22 source would be essentially irrelevant.” *Robertson*, 436 U.S. at 593. But that isn’t what
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1 § 1988 says. Instead, “§ 1988 quite clearly instructs us to refer to state statutes; it does
2 not say that state law is to be accepted or rejected based solely on which side is
3 advantaged thereby.” *Robertson*, 436 U.S. at 593. Thus, a state statute resulting in
4 abatement of a civil-rights action must be applied as long as the statute is not generally
5 “inhospitable” to § 1983 actions. *Robertson*, 436 U.S. at 594.

6 The nonclaim statute in Washington’s probate code is not generally inhospitable
7 to civil-rights claims, even though it means Mr. Simmers cannot pursue claims against
8 the estates of these two deceased Deputies. The claims are barred here only because
9 of the rare circumstances presented: the claims relate to a police investigation that
10 occurred decades ago, and two of the potential defendants died years ago.

11 Moreover, Washington’s nonclaim statute has no effect on the policy of deterring
12 police misconduct, because officers are not realistically going to consider whether their
13 actions might expose their estates to liability long after they have died. Nor does the
14 nonclaim statute affect the policy of compensation for victims of alleged police
15 misconduct because most plaintiffs will sue living officers. Indeed, Mr. Simmers has
16 named numerous living defendants who are capable of being sued.

17 This is what the U.S. District Court for the Northern District of Ohio concluded
18 when it ruled against another client of Mr. Simmers’ attorneys’ law firm on this very
19 issue. The court in *Jackson v. City of Cleveland*, applying Ohio law to fill the gaps in
20 federal law, held that a civil-rights claim for wrongful conviction abated upon the death
21 of the officers. 219 F. Supp. 3d 639, 642–43 (N.D. Ohio 2016). The court reasoned
22 there was no inconsistency with federal law because, despite abatement of rare claims
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1 against deceased officers, “the great majority of § 1983 cases will adequately provide
2 compensation for constitutional injuries and deter state actors who violate the
3 Constitution.” *Id.* at 643.

4 **CONCLUSION**

5 Mr. Simmers’ motion to substitute the estates of Major Beard and Sergeant Rusk
6 should be denied. There are no defendants to be substituted out, an estate cannot be
7 sued, there are no personal representatives to substitute in, and the Court lacks
8 jurisdiction to appoint personal representatives. Furthermore, under Washington’s
9 nonclaim statute—which applies both to state claims and federal claims—any potential
10 claims against Major Beard’s or Sergeant Rusk’s estates abated years ago.

11 DATED: March 29, 2021

12 SEAMARK LAW GROUP PLLC
13 Attorneys for Major McSwain,
14 Captains Baxter and Raftis, and
the Beard and Rusk Families

15 *s/Geoff Grindeland*

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Attorneys for Plaintiff

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I further certify that on the date below I mailed by U.S. Postal Service a copy of the foregoing document to the following non-CM/ECF participants:

N/A

DATED: March 29, 2021

s/Geoff Grindeland

Geoff Grindeland